

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

EPLUS, INC.,

Plaintiff,

v.

Civil Action No.
3:09CV00620

LAWSON SOFTWARE, INC.,

Defendant.

Before: THE HONORABLE ROBERT E. PAYNE, JUDGE
HEARING ON EPLUS' MOTION TO STRIKE

May 24, 2010

Richmond, Virginia

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1 were to do. You were to respond to what they said.
2 It is your obligation to say the Markman hearing
3 changed again, here's where it changed, here's what
4 we -- here's where in the Shamos report he addresses
5 that, and that's it.

6 What you want to do is this. You want to
7 use the expert's report in the way that the Federal
8 Rules were changed to stop the Federal Rules from
9 being used as games because that's the way people used
10 to play the game. They used to say, oh, well, now
11 we'll use the federal -- the expert's report as a
12 vehicle to bring into the case things that aren't
13 appropriate, and you all want to -- you do the same
14 kind of thing, and I just -- I'm worn thin with it
15 all.

16 MR. MCDONALD: Well, it wasn't our intent
17 to --

18 THE COURT: So you didn't tell me but two
19 ways in which the Markman hearing -- Markman ruling
20 changed the rules, and I understand the law on that
21 and that's -- it's correct that if the Markman hearing
22 changes the rules and you can show that it changes the
23 rules, then you're entitled to have some comment on
24 it. But you did that. In your brief, you pointed out
25 two things, and I want you to now show me the part of

1 THE COURT: I've had enough of this.

2 MR. MCDONALD: I can appreciate that.

3 It's --

4 THE COURT: It is the -- this is the game
5 of hide the pea, and it changes every time that
6 something happens.

7 Now, I do understand the basic principle
8 of law that if the Markman hearing necessitates some
9 other comments from an expert, then perhaps that ought
10 to be allowed, but I first need to -- the predicate
11 for that is, A, what part of the Markman hearing does
12 that, and B, what part of the report then responds to
13 the Markman hearing. And I have not -- I've gotten
14 you to tell me what part of the Markman hearing does
15 it, and I've got that language. Now I'm looking for
16 B. Where is the part that addresses -- of this man's
17 report that addresses it?

18 Now -- that language, and that language is
19 "means for building a requisition using data relating
20 to selected matching items and their associated
21 sources." And I don't have a page -- it's not in
22 his -- the textual 76 pages of his report you tell me,
23 so I've got to go look at a chart. I can look at a
24 chart and I have no way through it except for the
25 number of red tabs I'm working on. I can't -- it's --

1 Lawson for a deposition about its prior art systems,
2 and then when they saw that the Lawson prior art was
3 not in our supplemental invalidity contentions, they
4 said, oh, well, do we not need that deposition
5 anymore? And we said, well, no, we want to make it
6 perfectly clear that the Lawson prior systems are
7 relevant for reasons other than invalidity, so you
8 better make sure you take that deposition so you can
9 get that background information.

10 THE COURT: Yes, but that's not what's
11 before me today.

12 MR. MCDONALD: Well, and if that's clear,
13 then that's fine. As I understand it, the issue is
14 whether we're going to stop Dr. Shamos from talking
15 about the Lawson system as a prior art system and give
16 opinions on invalidity.

17 THE COURT: Yeah.

18 MR. MCDONALD: And that's a totally
19 different issue from whether or not the Lawson systems
20 that preexisted the hypothetical negotiation would be
21 at issue.

22 THE COURT: I'm not ruling on that. It
23 may very well be that you can't get it in, but I'm not
24 ruling on it today except that it cannot come in
25 through Dr. Shamos because he didn't, by his own

1 it at trial. But I think they have made a showing
2 sufficient that CellPro ought to operate there to
3 allow the discovery to be taken and the opinion to
4 remain at this time.

5 The other I don't have any basis for
6 making a comment on, for making a ruling on, so I am
7 not going to be able to -- to rule. I believe that
8 the party arguing the application of CellPro has the
9 burden to demonstrate how the claim construction
10 opinion necessitates listing additional prior art
11 opinions and references, and that hasn't been carried
12 here as to the second -- that is the -- the second
13 reference; that is on the one on page 6, and so that
14 can't be allowed, which basically means that to the
15 extent that version 5 -- Lawson version 5 and 6 are
16 dealt with in the opinion offered by Shamos in
17 response to the claim construction opinion section
18 that says "means for searching for matching items in
19 the database" can be considered further, subject to
20 revisititation at trial.

21 The others I have -- I believe Lawson has
22 not covered that basis -- covered its burden. And
23 version 6 and version 5 were in their initial list.
24 They were going to pare it down. They dropped it, and
25 then the addition of it keeps it out to -- and only --